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Wal-Mart in the Garden District: Does the Arbitrary and Capricious Standard of Review in NEPA Cases Undermine Citizen Participation?

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Dawn E. Jourdan and Kevin Gifford

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Abstract

The National Environmental Policy Act (NEPA), enacted in 1969, requires that agencies of the U.S. government or those seeking to use federal funds to construct projects study the environmental and social impacts of said projects. Under the provisions of NEPA, a first-level review must be conducted for all projects not otherwise exempted. If the entity conducting the review deems that the project will result in a significant impact on humans or the environment, an environmental impact statement (EIS) must be prepared. The decision about whether or not to prepare an EIS can be controversial due to the fact that the entity charged with preparing the initial review ultimately makes decisions regarding the necessity of the preparation of the EIS. This paper explains the NEPA review process and the controversy that may result when the entity preparing the EIS does not respond to public concerns that a proposed project has a significant impact

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on the environment. The legal history of *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215 (5th Cir. 2006), provides a glimpse of a growing concern that the standard of review employed in these cases undermines efforts to involve citizens in the public comment process. The paper concludes with a discussion of how NEPA might be modified to ensure that citizens are given an adequate opportunity to participate in NEPA review.

I. Introduction

Situated on the Gulf of Mexico and rich in history, the New Orleans of today is a different city than it was in 1995 when the Housing Authority of New Orleans (HANO) began efforts to secure federal funding for the revitalization of the St. Thomas public housing project. At that time, the historic city had a disproportionately high number of public housing units compared to other cities in the United States. As a result of Hurricane Katrina, New Orleans was forced to relocate the majority of public housing residents to other locations. News reports chronicled the tales of these residents, some relocated as far away as Montana.

Four years after Hurricane Katrina, less than half of the city's residents have returned. A relatively small proportion of those living in public housing have been able to return to the city, in part because of the damage the storm did to units previously deemed distressed. In the last year alone, 4,500 units of public housing have been demolished. The law no longer requires one-to-one replacement of public housing units. As a result, the city and HANO are compelled to rebuild fewer units than previously existed. Most of the new units will be built as a part of mixed-income, New Urbanist-styled housing developments. To some, this marks an improvement in living conditions in the city, possibly bringing an end to concentrated pockets of poverty. Others criticize the manner in which such new developments will change the urban fabric of this historic city.

These changes began occurring before the devastation resulting from Hurricane Katrina. In 1996, HANO successfully secured grant funding from the U.S. Department of Housing and Urban Development (HUD) for the demolition of the St. Thomas public housing project. As required by the National Environmental Policy Act (NEPA) (due to the involvement of federal funding) and § 106 of the National Historic Preservation Act (NHPA) (because of the project's location in the nationally registered Garden District), HANO-HUD issued an environmental assessment (EA) with a finding of no significant impact (FONSI). An environmental impact statement (EIS) was not conducted in spite of the fact that plans for the redevelopment included the construction of a big box store. The Coliseum Square Association, Inc. (CSA), a nonprofit organization representing residents and merchants in the area, was unsuccessful in a challenge and appeal of HANO-HUD's EA and its subsequent FONSI because, according to the U.S. Court of Appeals for the Fifth Circuit, the decision not to prepare an EIS was not arbitrary and capricious. This article considers the legal insufficiency of the challenges brought by CSA and the role of citizen participation in challenging a federal agency's decision not to prepare an EIS.

Section 2 of this article chronicles the relationship among three federal statutes: Housing Opportunities for People Everywhere (HOPE VI), NEPA, and the NHPA. Section 3 chronicles litigation involving the revitalization of the St. Thomas public housing project by HUD and HANO and the standards of review applied by the various courts rendering a decision. Section 4 concludes with a discussion of how NEPA might be modified to ensure that citizens are given an adequate opportunity to participate in NEPA review in cases involving historic properties.

II. Connecting HOPE VI, NEPA, and the NHPA

A. Brief Introduction to HOPE VI

The HOPE VI program is the result of a congressional effort to address the decay of public housing in the United States. Congress created the National Commission on Severely Distressed Public Housing to investigate the state of public housing and to make recommendations for new housing policy to address those needs. The commission's report indicated that more than 86,000 units of public housing were "severely distressed."¹ In its final report issued in 1992, the commission urged Congress to authorize "a new partnership program among public housing authorities (PHAs), non-profit organizations, the private sector, and residents to attract additional resources."² Based on the findings of the commission, Congress authorized the creation of the HOPE VI program.³

The HOPE VI law was not based on legitimate evidence that the act would bring about the changes sought.⁴ Rather, the law was based on a sense that a radical approach to housing policy was necessary to correct for the failure of previous governmental actions to deal with distressed public housing.⁵ The major premise of the act is to "improve lives by helping relocate to better neighborhoods or creating healthier communities at the same site."⁶ At the heart of this new breed of housing policy was the de-concentration of poverty by replacing distressed public housing units with mixed-income, mixed-use New Urbanist communities.⁷

The HOPE VI law allows PHAs to compete on an annual basis for funds to revitalize severely distressed public housing communities. The PHAs file extensive applications with HUD justifying their requests for funds. These applications are reviewed based on the following criteria: "level of obsolescence of the current project, consultation and cooperation with residents, density and income mix of the proposed project, leveraging of outside resources, family self-sufficiency plans for residents, size of the new development, and the need for funding."⁸ Affected residents are relocated upon receipt of HOPE VI funds by PHAs, in part through the use of Section 8 housing vouchers.⁹ Affected parties who do not qualify to use Section 8 vouchers are transferred to other public housing communities. In most instances, relocated residents are typically given priority for units in the revitalized community, provided that they meet the new community's screening requirements.¹⁰

PHAs that receive HOPE VI revitalization grants are subject to the terms of NEPA.¹¹ At a minimum, these PHAs must produce an EA, generally

detailing the impact of the redevelopment on the relocated residents and the surrounding community.¹² In the event that the EA reveals that the effects of the redevelopment will be significant, the law mandates the production of an EIS, as more fully detailed in section 2.

B. NEPA's Purpose and the EA Process

NEPA was passed by the U.S. Congress in 1969 in response to the growing environmental concerns of the 1960s.¹³ The years prior to the passage of NEPA also saw the birth of such legislation as the Wilderness Act of 1964, the Multiple-Use Sustained-Yield Act, the Wild and Scenic Rivers Act, and the NHPA.¹⁴ This legislation coupled with the massive response seen at the nation's first Earth Day celebration in 1970¹⁵ illustrated that the country was finally ready to accept the idea that America's resources were something to be protected and managed rather than simply exploited. NEPA's text states its mission explicitly:

... to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.¹⁶

Although the "what" of NEPA's mission is rather clear, the "how" remains the subject of some contention. Scholars disagree over whether NEPA mandates merely procedural actions or whether a substantive component is involved.¹⁷ Federal case law on the subject is stacked in favor of a strictly procedural interpretation of the statute; the Supreme Court has ruled that NEPA mandates only procedure on numerous occasions.¹⁸ Despite the weight of two decades of precedent, publications abound insisting that NEPA's full potential cannot be fulfilled as long as the courts refuse to recognize its true purpose as a substantive review of federal actions. Some of these voices have pinned their hopes on NEPA's § 102(1), which directs that U.S. law shall "be interpreted and administered in accordance with the policies set forth in this Act."¹⁹ This section of the act has not been used as a source of substantive review since 1979, and the courts seem content to view NEPA merely as a series of hoops through which agencies must jump before they complete their projects.²⁰ The current emphasis lies in ensuring that agencies are aware of the possible impacts of their actions, not in mandating a specific course of action.²¹ As stated in the opinion of one court, "NEPA prohibits uninformed, not unwise, agency actions."²²

Although the debate over NEPA's substantive application continues, NEPA's most far-reaching contribution has been the introduction of the EIS process. An agency must only comply with NEPA when proposing an action "significantly affecting the quality of the human environment."²³ The question of what constitutes a significant action then arises. The process of making this decision is known as a threshold determination and is accomplished through the preparation of an EA. The EA is a public document that contains the information necessary to make a threshold determination.²⁴ By

law, the EA must incorporate an account of the possible environmental effects of the proposed action, alternatives to the proposal, the ways in which the short-term gain achieved by this action affect long-term productivity, and any resource commitments necessary to implementation that would be unable to be reversed or retrieved.²⁵ In order to make a threshold determination, an EA must be prepared for every proposed federal action, with few exceptions. The NEPA regulations of the Council on Environmental Quality allow for categorical exclusions, or categories of actions that do not constitute a significant impact on the human environment.²⁶ Each federal agency is charged with developing its own NEPA regulations, including the definition of categorical exclusions and those categories of actions that normally do constitute a significant impact.²⁷ If the proposed action falls into the latter category, then the agency may skip the EA process and proceed directly to preparation of an EIS.²⁸

The EIS is a federal agency's proof that it has considered its proposed action from an environmental standpoint. The EIS is filed when the EA indicates that the proposed action will have a significant impact on the environment.²⁹ An extension of the EA, the EIS provides an analysis of the environmental effects likely to occur as a result of the proposed action, along with alternative plans that would allow for the mitigation of those effects, including the environmental effects of taking no action at all.³⁰ This "no-action" alternative provides the reviewers of the EIS with a baseline by which to judge the other alternative plans.³¹ The agency should also specify why it chose not to follow one of these alternatives and explain its reasoning.³²

After preparing an EA, the agency must prepare a FONSI if it finds that its action will not constitute a significant impact. This document explains why the agency does not believe its action will affect the environment.³³ Like the EA, the FONSI must be made available to the public for a period in order to allow public comment.³⁴ As one might imagine, FONSIs are often challenged, and courts often look to the level of public participation in the process when deciding how much deference to give the agency's decision. Low levels of participation and comment make the FONSI more suspect, and high levels almost guarantee that the agency's determination will stand.³⁵ One author went so far as to declare that the deference paid to agency determinations was such that the only way to prove one wrong was to prepare an EIS of one's own, which is quite expensive and outside the resources of most citizens' groups.³⁶ This necessitates a certain amount of good faith on the part of federal agencies lest the concentration of decision-making powers that NEPA invests in them lead to abuse and actions that, although satisfying the letter of the law, are not undertaken in the best interests of the human environment.³⁷

C. Historic Preservation: Common Link Between NEPA and the NHPA

In most public circles, NEPA is known most prominently as an environmental statute. After all, it created the Council on Environmental Quality,

and its text is full of rhetoric about the relationship between man and nature.³⁸ What is often overlooked by the casual observer is the inclusion of historic resources under the umbrella of NEPA protection. Section 101 of the act lays out the environmental policy of the United States, including the desire to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice."³⁹ Although this is the only instance in the act in which the preservation of historic resources is mentioned specifically, the section of NEPA dealing with the responsibilities of the Council on Environmental Quality mandates that the office of the president submit an annual report to Congress on the condition of the human environment.⁴⁰ Specific areas to be addressed include "major natural, manmade, or altered environmental classes," as well as the "urban, suburban, and rural environment."⁴¹ Thus, in addition to placing preservation activities among the top six priorities for the act, NEPA implies that the concept of human environment should be inclusive of the manmade world, not simply of natural resources.

The debate over whether NEPA is substantive or procedural law is probably the largest interpretation issue in the case law pertaining to this act, but determination of significance with regard to historic properties presents an equally thorny issue. The difficulty with including historic resources within the larger concept of human environment is that how NEPA applies to any particular property is not governed by a strict rule but must be determined by each EA, which is carried out by the agency pursuing the project.⁴²

For example, the Council on Environmental Quality's definition of *human environment* notes that social and economic effects on the environment do not by themselves necessitate the preparation of an EIS.⁴³ In certain situations, the destruction of historic properties has been interpreted by the courts as having only social effects, therefore not warranting an EIS.⁴⁴ This represents a breach of protection for historic resources; and although the inclusion of historic resources in a larger conception of the environment shows national support for preservation efforts, significance determinations do not. By contrast, the NHPA specifically governs federal actions over properties eligible for inclusion on the National Register of Historic Places.⁴⁵ The NHPA's use of the National Register as a benchmark not only clarifies the issue of significance, but it removes responsibility for the assessment of significance from the hands of a possibly biased agency because determining eligibility for inclusion on the National Register is the duty of the state historic preservation officer (SHPO).⁴⁶

In the absence of such fixed criteria for NEPA cases, the suggestion has been made to change who bears responsibility for the preparation of EIS documents.⁴⁷ Timothy Brady, one of the voices in the substance-versus-procedure debate, argues that, due to the fact that NEPA often represents an obstacle to federal agencies, a tendency may exist to write biased EAs and EISs.⁴⁸ This could be corrected by vesting responsibility for this part of the review process with the Environmental Protection Agency (EPA) or

some other impartial third party, thus resulting in more effective protection of our human environment.⁴⁹

NEPA is usually construed as a primarily environmental statute, but its declaration of policy includes historic and cultural resources as objects of protection and preservation.⁵⁰ As such, the usual EA process applies when federal actions constitute a significant impact upon such resources.⁵¹ The elegance of NEPA lies in the fact that the EA process is designed to be the same regardless of whether the project under consideration impacts ecological, cultural, or historic resources. After all, they are all considered to be part of the larger, "human environment."⁵² NEPA does not stand alone, however, and any investigation of historic preservation review under it would be incomplete without considering the NHPA.

Although the procedures are different, the EA process has a great deal in common with § 106 review under the NHPA.⁵³ Section 106 requires federal agencies whose actions have the potential to adversely affect structures previously designated as historic sites or sites eligible for inclusion on the National Register of Historic Places to consider such impacts and allow the Advisory Council on Historic Preservation (ACHP) an opportunity to comment.⁵⁴ Historic resources requiring NEPA review may or may not be listed on the National Register, but the NHPA and NEPA do often apply to many of the same properties; and because both acts require agencies to collect very similar information during their assessment phases, the two laws often reinforce each other.⁵⁵ When suits are brought against federal agencies in the interest of protecting historic structures, it is common for plaintiffs to seek relief under both the NHPA and NEPA.⁵⁶

Section 106 of the NHPA is based heavily on the involvement of three key players: ACHP, the SHPO, and the head of the federal agency whose project is under review.⁵⁷ The SHPO is responsible for consulting with the agency head and identifying any properties in the vicinity of the project that may be eligible for inclusion on the National Register, along with making a determination of the effects that the project is likely to have on these properties, as well as those structures previously designated as historic.⁵⁸ In the event that the project will have an adverse effect on historic properties, the SHPO is also the person in charge of negotiating with the agency for mitigation.⁵⁹ A memorandum of agreement (MOA) outlining the mitigation measures is drafted if the negotiations are successful, and the matter is referred to ACHP if an agreement is not forthcoming.⁶⁰ The council can then review the case and submit comments, which the agency will take under advisement, though it is allowed discretion as to whether or not to adopt any of the proposed changes.⁶¹

Like NEPA, the NHPA has been interpreted as a largely procedural statute; and like the EA process, § 106 review has no provision requiring a federal agency to accept any changes proposed either by the SHPO or ACHP.⁶² The primary difference between the two acts lies in their scope. NEPA's contribution to the cause of historic preservation is that it articulates the protection of historic resources as being a fundamental part of the larger effort for environmental protection,⁶³ but it places no burden for mitigation.

NHPA is far more focused; and although § 106 does not require agencies to mitigate, the negotiations with the SHPO or ACHP usually result in at least modest mitigation of any adverse effects.⁶⁴ Thus, although the two acts may seem to be redundant, they should actually be seen as complements to each other.⁶⁵ Recent years have even seen agencies use data collected for one of the acts to satisfy the review requirements of the other.⁶⁶

A case in point is the Van Ness Project, a housing project in the Mission District of San Francisco for HIV/AIDS patients and low-income tenants.⁶⁷ Because of HUD funding, EA and § 106 review were both undertaken, and several historic properties in the area were determined to be at risk for adverse effects from the project.⁶⁸ HUD, the City of San Francisco, ACHP, and the SHPO for the State of California signed an MOA detailing their mitigation measures; and when the city gave public notice of the release of funds to the project, it declared a FONSI, stating that its NEPA obligations were being fulfilled by adhering to the tenets of the MOA signed under § 106 review.⁶⁹

The Van Ness Project also illuminates a certain measure of ineffectiveness shared by the NHPA and NEPA.⁷⁰ The MOA for the project stated that the city would allow for public discussion of the project if a complaint was filed in writing.⁷¹ The owners of some of the affected historic properties filed their first complaint a month after construction began but were denied standing.⁷² By the time the U.S. Court of Appeals for the Ninth Circuit determined that the homeowners had suffered an injury because the project's design, bulk, parking requirements, and aesthetic qualities were not in keeping with the character of the historic neighborhood, construction had been completed, and the housing was occupied.⁷³

III. *Coliseum Square Ass'n, Inc. v. Jackson*

A. *HANO-HUD's Proposal to Revitalize St. Thomas*

For decades, tourists from all parts of the world have flocked to New Orleans to celebrate Mardi Gras and to enjoy the cultural and architectural history of this beautiful historic city. New Orleans is composed of a multitude of neighborhoods containing unique architectural history, including the Garden District neighborhood, which is at the heart of this litigation.

The Garden District, developed between 1832 and 1900, originally had only a couple of houses per block. Each was surrounded by a garden. As time passed, the gardens were subdivided and developed with the late Victorian structures that inhabit these spaces today. The district was listed as a national landmark in 1974.

The St. Thomas housing project was built in 1941. The development, as originally constructed, was made up of 120 buildings and covered ten city blocks. Until the 1960s, this housing project was segregated and thus inhabited by white residents. St. Thomas was desegregated in the 1960s; this act by the government had an immediate and significant effect on the composition of the population living in the projects as well as the Garden District. This neighborhood began to rapidly deteriorate as a result of white flight from urban neighborhoods. At the time St. Thomas was closed by

HANO, all of its residents were African American. Like many public housing communities built in the 1940s, the St. Thomas housing project became blighted as a result of a number of factors, including the intrusion of drugs and gangs and the effects of concentrated poverty. In an effort to take advantage of federal funds set aside for the demolition of housing proven to be "severely distressed," HANO began working with the residents of the housing project to secure a HOPE VI revitalization grant.

HUD granted HANO a \$25 million HOPE VI revitalization grant to transform the St. Thomas projects in 1996. Upon the award of the grant, HANO completed a § 106 review in order to ascertain possible impacts of the revitalization project on the Garden District, ultimately finding that the redevelopment of the St. Thomas public housing community would have no significant negative impact on the surrounding area. Based on this review, an MOA was signed by HANO, the SHPO and ACHP supporting the PHA's findings. Subsequently, the remaining 800 residents of St. Thomas were relocated, and the housing project was demolished. In May 2001, HUD performed an EA and issued a FONSI, concluding that the redevelopment of the St. Thomas housing project would not have a significant impact on the human environment.

*B. CSA Challenges and Loses,⁷⁴ and Loses,⁷⁵
and Loses Again⁷⁶*

In July 2002, CSA filed suit in district court, charging, among other failures, that HANO's decision not to prepare an EIS was in error. CSA claimed that an EIS was appropriate because, at the time the suit was filed, the project had consumed over \$10 million in HUD funds and resulted in the displacement of about 800 families and the demolition of 116 properties listed on the National Register of Historic Places.⁷⁷ At most, a victory by CSA would have temporarily halted further demolition and the construction of the proposed development while a more detailed EIS was prepared. This delay would have given the members of CSA, as well as other concerned citizens, an opportunity to comment on the potential impacts of the proposed development on this historic neighborhood. In fact, members of CSA were given the opportunity to offer further comments as a result of the litigation.⁷⁸ During the pendency of the law suit, HUD reopened the NEPA process, calling for additional studies, public comment, and the signing of a new MOA with the SHPO.⁷⁹ The second NEPA process concluded with the filing of a second FONSI on February 20, 2003.⁸⁰ Subsequently, the district court dismissed CSA's case as moot.⁸¹ Based on the documents produced as a result of the second NEPA process, CSA filed a new complaint, which was dismissed as moot.⁸² This stage of litigation concluded with the district court's grant of HUD's motion for summary judgment.⁸³ Subsequently, the site was razed, and construction of the new development commenced.

CSA, joined by numerous amici, appealed to the Fifth Circuit in December 2004.⁸⁴ Immediately, HUD challenged the appeal as moot because the site had already been cleared; and by the time the appeals court heard oral

arguments on the case in 2006, a significant portion of the development was completed. The two-year delay between the time CSA filed its appeal and the time the court rendered its judgment is atypical. It is important to recognize that the court's final ruling on this matter was delayed as a result of the hurricanes that forced the residents of New Orleans to evacuate their city in the fall of 2005. It took the courts in the region nearly a year to manage the cases placed on their dockets prior to the evacuation. In spite of the significant damage that the hurricanes unleashed on many areas of the city, the site involved in this litigation survived with little impact.

The appeals court ultimately ruled that although the case was not moot, there was no evidence that HUD had acted in an arbitrary and capricious manner in issuing a FONSI.⁸⁵ CSA argued, among other legal issues, that "HUD acted arbitrarily and capriciously or unreasonably because the evidence available to HUD mandated preparation of an EIS."⁸⁶ CSA cited various provisions of the law that mandate the filing of an EIS, including projects with unacceptable noise exposure;⁸⁷ projects that "remove, demolish, convert, or substantially rehabilitate 2,500 or more existing housing units . . . or . . . result in the construction of installation of 2,500 or more housing units";⁸⁸ projects that result in environmental justice impacts;⁸⁹ and projects that require significant changes in the local zoning, impact existing businesses, and cause increases in traffic and adverse impacts on historic properties, among other impacts. Upon review of these issues, the appeals court deferred to the studies on which HUD relied as the basis for its FONSI. The court found that CSA had failed to demonstrate that HUD acted arbitrarily, capriciously, or contrary to the law.⁹⁰ CSA, in the court's opinion, had failed to offer sufficient proof that the evidence considered by HUD in its EA was inaccurate.

CSA, joined by a number of amici, filed a petition for a writ of certiorari to the U.S. Supreme Court in April 2007. A highly respected group of land use and administrative law professors offered a brief in support of CSA's petition. At the heart of their challenge was a concern for the different standards of review utilized by courts reviewing the decision of a federal agency not to prepare an EIS.⁹¹ In *Marsh v. Oregon Natural Resources Council*,⁹² the Supreme Court announced an arbitrary and capricious standard of review applicable to decisions of federal agencies not to prepare EISs. The problem, according to the amici, is that this standard is not being applied uniformly by the federal appeals courts.⁹³ Although CSA and its supporting amici were not successful in securing an appeal to the U.S. Supreme Court, the issues they raised merit additional consideration.

To begin, there exists a split in the manner in which the U.S. courts of appeals interpret the arbitrary and capricious standard established in *Marsh*.⁹⁴ According to the amici, "the First, Second, Ninth, Eleventh, and D.C. Circuits uniformly review an agency's decision not to prepare an Environmental Impact Statement under a 'substantial possibility' standard."⁹⁵ Pursuant to this interpretation of the arbitrary and capricious standard, the amici argued that agencies must investigate the potential effects of the

proposed development before issuing a FONSI.⁹⁶ Under this interpretation of the law, plaintiffs challenging an agency's decision not to file an EIS do not have to prove that significant effects will occur; they only have to offer "substantial questions whether a project may have a significant effect on the environment."⁹⁷ By contrast, the Third, Fifth, and Tenth Circuits require plaintiffs challenging an agency's decision not to file an EIS to prove that the occurrence of the anticipated impacts is "nearly certain."⁹⁸

The Supreme Court did not seek to address this split in interpretation of the arbitrary and capricious standard used to determine the appropriateness of agency decisions not to file an EIS. Perhaps, to the Court, this case was not an appropriate vehicle to test this issue. However, as the amici rightfully argue, at the heart of this issue lie the foundational principles of NEPA, which stress "... informed decision making and public participation."⁹⁹ In preparing an EA, an agency does not have to publish its findings in the Federal Register in an effort to seek public comment or to submit the EA to any supervisory agency for further review.¹⁰⁰ As a result, the public plays little, if any, role in helping the government understand the diversity of impacts that a proposed project may have on an area or the people who live in it. However, the law requires public comment in the preparation of an EIS. As a result of this requirement, the public is provided with the opportunity to be fully informed about proposed projects and to play a role "... in both the decision making process and the implementation of that decision."¹⁰¹ Public participation is a critical component of NEPA review as the law requires "that ... each person has a responsibility to contribute to the preservation and enhancement of the environment."¹⁰² By inviting and encouraging the public to participate, federal agencies "... respond to citizens needs and build trust in surrounding communities."¹⁰³

Arguably, HUD's greatest failure with respect to the revitalization of St. Thomas was in failing to seek adequate public participation and support before making independent plans to redevelop the site. There was likely great excitement when HANO announced plans to submit a grant application to HUD for the revitalization of a public housing complex that had become blighted. It is common for the residents of affected housing communities, as well as those living in the surrounding neighborhoods, to embrace the opportunities to replace these decaying developments with something more livable. HANO's efforts would have been greatly improved by reaching out to the community to begin discussions about how the site might be redeveloped in such a way that the impacts of the proposed development would be overwhelmingly positive. HUD should have reviewed HANO's application to ensure that those living in the Garden District were fully supportive of the revitalization effort.

The turning point in this redevelopment effort was likely in HANO's announcement that the reserved commercial space in this project would be dedicated to the development of a Wal-Mart Superstore. At all stages of the litigation, CSA argued that the development of a Wal-Mart store would

have significant impacts on the historic Garden District, including, among other things, competition for existing small businesses, traffic congestion, intensity of the land use in a mostly residential urban neighborhood, and interference with the street grid system. There is also evidence available to suggest that the installation of a big box retail store in a deteriorating urban neighborhood can have positive impacts on the vitality of a decaying community.¹⁰⁴ However, past experience has taught those engaged in planning and development activities that the addition of a big box retail space to the urban landscape, particularly one owned by Wal-Mart, will likely elicit major public reactions as a result of store closings and unpopular management strategies, among other issues. The courts refused to consider the merits of these arguments, instead concluding that plaintiffs failed to provide "concrete evidence" that the anticipated impacts would occur.¹⁰⁵ The amici encouraged the U.S. Supreme Court to revisit this ruling on points of language and law, suggesting that NEPA requires the preparation of an EIS when impacts are likely, not foreseeable.¹⁰⁶ Although the argument did not convince the U.S. Supreme Court to take up this special cause, the Court will invariably be asked to revisit this issue in the future. Until that time, plaintiffs will only be successful in challenging such decisions if they are able to discredit the experts hired by agencies to study the impacts of proposed developments. In the meantime, litigants should continue to remind courts about the purposes at the heart of NEPA. Simultaneous efforts should also be made to encourage the legislature to tighten the public participation requirements of this law.

IV. Postscript: The Drama Continues

In general, the resolution of legal disputes by courts creates a legacy through the formulation of precedent. The precedent set in the *Coliseum Square Ass'n* case is the next step in the evolution of NEPA case law. It reminds us that federal courts continue to rely on the expertise of governmental agencies at local, state, and federal levels and the decisions they render. The message of the Fifth Circuit is clear: decisions of governmental agencies not to file EISs will be validated unless those challenging such decisions can offer concrete proof of the impacts alleged. The evidentiary burden on the challenger is high, and it is unlikely that those without the means to hire expensive experts to prove impacts will be successful in challenging the issuance of FONSI. This proves particularly problematic in situations where those likely to suffer the most significant impacts of such large-scale urban revitalization activities are the urban poor, including those who live in the more than 4,500 units of public housing that the city and housing authority are making plans to raze.

Prior to the damage inflicted by Hurricanes Rita and Katrina, the City of New Orleans had a higher proportion of public housing than any other city in the United States. At that time, there were nearly 5,000 families, most of them African American, living in public housing.¹⁰⁷ The waiting list for public housing units included another 8,250 families.¹⁰⁸ The majority of the units were closed, even though many were not affected by

floodwaters, after the hurricanes. The majority of the unaffected units have never reopened, with less than 1,100 units being occupied as of July 2006.

In seeking to demolish 4,500 units of public housing, HANO argues that repair of the units is cost-prohibitive because renovation would cost more than \$130 million.¹⁰⁹ It seeks to replace many of the demolished public housing complexes with new mixed-use and mixed-income developments similar in form to the St. Thomas public housing community. Those critical of HANO's proposals for revitalization are concerned that these new communities will not provide enough housing for all of those who qualify for public assistance, particularly because screening requirements would prevent those with poor credit histories, drug and alcohol addictions, and felony records from inhabiting these new HOPE VI-style communities. Even though four years have passed since New Orleans was evacuated, emotions continue to run high regarding HANO's plans for the redevelopment of public housing units in the city. In December 2007, the police used pepper spray and stun guns to control protestors who opposed the demolition of the B.W. Cooper Apartments.¹¹⁰ That same week, protestors sought to prevent demolition crews from reaching the apartment complex.¹¹¹

Even now, emotions continue to run high about redevelopment efforts in New Orleans, particularly with respect to proposals to redevelop housing previously inhabited by the city's poorest residents. Bill Quigley, human rights attorney and director of the Poverty Law Clinic at Loyola Law School, contends that there are *Twenty-Seven Legal Problems with HANO-HUD Demolition Plans*, including problems related, among other critical issues, to the following:

- Tenant consultation
- Racial discrimination
- Due Process and Equal Protection rights relating to evictions
- Failure to create enough new units to meet the demand for affordable and public housing opportunities
- Compliance with NEPA and the NHPA¹¹²

These same concerns relevant to the *Coliseum Square Ass'n* litigation remain relevant as the city seeks to rebuild. Although the decision in *Coliseum Square Ass'n* was instructive about the legal sufficiency of an EA in that circumstance, the Fifth Circuit's opinion offers little instruction for resolving the affordable housing crisis that persists in the city.

1. NAT'L COMM'N ON SEVERELY DISTRESSED PUB. HOUS., FINAL REPORT OF THE NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING: A REPORT TO THE CONGRESS AND THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT 2 (GPO 1992).

2. ABT ASSOCS. INC., AN HISTORICAL AND BASELINE ASSESSMENT OF HOPE VI, at 1-8 (1996), available at www.huduser.org/publications/pdf/hopevi_vol1.pdf.

3. HOPE VI was not the first version of this act. HOPE I sought to provide grants to housing authorities in an effort to increase homeownership among

residents of public and Native American housing. The last time funding was sought under HOPE I was 1995. In 1988, the component of the act that provided assistance to Native Americans was removed and reassigned to a separate HUD-authorized grant program. HOPE II expanded the powers of this act to provide grants to increase homeownership among residents of multifamily housing projects whose income was less than 80 percent of the median of those living in their area. HOPE III expanded the scope of the law to provide grants offering opportunities for single-family homeownership to low-income families. No funding has been requested for the HOPE I through HOPE III programs since the 1995 fiscal year. The HOPE IV program was designed to combine Section 8 housing assistance with supportive services for the low-income elderly and to avoid premature entry to nursing homes. Although a \$9.9 million grant was originally awarded in 1993 for a pilot project under this version of the HOPE act, further funding has not been requested. According to James Bovard, writing for the Ludwig von Mises Institute's monthly newsletter, *The Free Market*, there was never a program designated HOPE V. Congress skipped from IV to VI, for unknown reasons. D. E. Jourdan, Planning to Reduce Worry: Designing an Intergenerational Planning Process to Lessen Relocation-Related Anxieties Experienced by Those Displaced in the Pursuit of a HOPE VI Revitalization Grant (Dec. 2004) (Ph.D. dissertation, Florida State University, Tallahassee), <http://etd.lib.fsu.edu/theses/available/etd-11092004-111706/unrestricted/Jourdandissertation.pdf>.

4. S.J. Popkin et al., *The HOPE VI Program: What About the Residents?*, 15(2) HOUSING POL'Y DEBATE 385, 386 (2004).

5. *Id.*

6. *Id.* at 387.

7. T.C. Wilson, An Alternative Community-Based Secondary School Education Program and Student Political Development (1974) (unpublished Ph.D. dissertation, University of Southern California, Los Angeles) (on file with author).

8. M.S. Fitzpatrick, Note, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421, 437 (2000).

9. *Id.*

10. *Id.*

11. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 853-54 (1970), 42 U.S.C. §§ 4321-4337.

12. Comment, *NEPA, Tipping and the Siting of Low-Income Public Housing: The Dangers of Strycker's Bay Neighborhood Council v. Karlen*, 6 COLUM. J. ENVTL. L. 31, 40-43 (1979).

13. H. Bartlett, Comment, *Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1)*, 13 TUL. ENVTL. L.J. 411, 416 (2000).

14. *Id.*

15. *Id.*

16. 42 U.S.C. § 4331(a).

17. T. Brady, Comment, *"But Most of It Belongs to Those Yet to Be Born": The Public Trust Doctrine, NEPA, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621 (1990).

18. *Id.*; see also *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978); *Strycker's Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

19. 42 U.S.C. § 4332.

20. Bartlett, *supra* note 13, at 427–28; *see also* Natural Resources Def. Council v. Berkland, 609 F.2d 553, 558–59 (D.C. Cir. 1979).
21. J. Barbeau, *Recent Developments in Environmental Law, Clean Water Act and National Environmental Policy Act*, 14 TUL. ENVTL. L.J. 597, 600 (2001).
22. Stewart v. Potts, 126 F. Supp. 2d 428 (S.D. Tex. 2000).
23. 42 U.S.C. § 4332(2)(C).
24. V. Fogleman, *Threshold Determinations Under the National Environmental Policy Act*, 15 B.C. ENVTL. AFF. L. REV. 59 (1987).
25. 42 U.S.C. § 4332(2)(C).
26. Council on Environmental Quality NEPA Regulations, 40 C.F.R. § 1508.4 (2009).
27. Council on Environmental Quality NEPA Regulations, 40 C.F.R. § 1507.3(b).
28. RONALD E. BASS & ALBERT I. HERSON, *MASTERING NEPA: A STEP-BY-STEP APPROACH* 31 (1993).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. Fogleman, *supra* note 24, at 60.
35. *Id.*
36. Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENVTL. L.J. 189, 212 (1998).
37. *Id.*
38. National Environmental Policy Act of 1969 (as amended), 42 U.S.C. § 4321.
39. *Id.* § 4331.
40. *Id.* § 4341.
41. *Id.*
42. Council on Environmental Quality NEPA Regulations, 40 C.F.R. § 1501.3.
43. *Id.* § 1508.14.
44. Fogleman, *supra* note 24, at 97.
45. National Historic Preservation Act of 1966 (as amended through 2000), 16 U.S.C. § 470f.
46. *Id.* § 470a.
47. Brady, *supra* note 17, at 645.
48. *Id.*
49. *Id.*
50. 42 U.S.C. § 4331.
51. *Id.*
52. 40 C.F.R. §§ 1508.8, 1508.14.
53. C.L. Walker & M.A. Israeloff, *Historic Preservation and the Institutional Owner*, 14 J.C. & U.L. 59, 82–83 (Summer 1987).
54. 16 U.S.C. § 470f.
55. Walker & Israeloff, *supra* note 53, at 83.
56. *See generally* Tyler v. Cuomo, 236 F.3d 1124 (9th Cir. 2000); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Preservation Coalition v. Pierce, 667 F.2d 851 (9th Cir. 1982).
57. Joe P. Yeager, *Federal Preservation Law: Sites, Structures, and Objects*, 8 WIDENER L. SYMP. J. 383, 396 (2002).

58. Sandra G. McLamb, *Preservation Law Survey 2001: State Preservation Law*, 8 WIDENER L. SYMP. J. 463, 471 (2002).
59. Yeager, *supra* note 57, at 396.
60. *Id.*
61. *Id.*
62. Guill, *supra* note 36, at 210.
63. National Environmental Policy Act of 1969 (as amended), 42 USC § 4331.
64. Walker & Israeloff, *supra* note 53, at 83.
65. *Id.*
66. *Id.*
67. Tyler v. Cuomo, 236 F.3d 1124, 1128 (9th Cir. 2000).
68. *Id.* at 1129.
69. *Id.* at 1129–30.
70. *Case Summaries*, 31 ENVTL. L. 535, 563–64 (Summer 2001).
71. *Id.*
72. *Id.*
73. *Id.*; see also Tyler, 236 F.3d at 1124.
74. Coliseum Square Ass’n, Inc. v. Dep’t of Hous. & Urban Dev., 2002 WL 31886808 (E.D. La. 2002).
75. Coliseum Square Ass’n, Inc. v. Jackson, 465 F.3d 215 (5th Cir. 2006).
76. Coliseum Square Ass’n, Inc. v. Jackson, 128 S. Ct. 40 (2007).
77. M.R. Lee et. al., *Recent Developments in Environmental Law*, 20 TUL. ENVTL. L.J. 235, 268 (2006).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Coliseum Square Ass’n, Inc. v. Jackson, 465 F.3d 215 (5th Cir. 2006).
85. *Id.*
86. *Id.* at 228.
87. 24 C.F.R. § 51.104(b)(2).
88. 24 C.F.R. § 50.42(b)(2).
89. Exec. Order No. 12,898, 59 Fed. Reg. 7,629, § 6-609 (1994).
90. Coliseum Square Ass’n, Inc. v. HUD, 465 F.3d 215, 241 (5th Cir. 2006).
91. Brief for Professors of Env’tl., Land Use Planning, and Administrative Law James Salzman et al. as Amici Curiae in Support of the Petition for a Writ of Certiorari at 3–4, Coliseum Square Ass’n v. Jackson, No. 06-1248, 2007 WL 1118286 (2007).
92. 490 U.S. 360, 377 (1989).
93. Brief, *supra* note 91, at 6.
94. *Id.*
95. *Id.* at 7.
96. *Id.* at 7–8 (citing City of Waltham v. U.S. Postal Serv., 11 F.3d 235 (1st Cir. 1993); Nat’l Audubon Soc’y v. Hoffman, 132 F.3d 7 (2d Cir. 1997); Anderson v. Evans, 371 F.3d 475 (9th Cir. 2002); Fund for Animals v. Rice, 85 F.3d 535 (11th Cir. 1996); Grand Canyon Trust v. FAA, 290 F.3d 339 (D.C. Cir. 2002)).

97. *Coliseum Square Ass'n*, 128 S. Ct. at 8 (citing *Anderson*, 371 F.3d at 488).

98. *Id.* at 9 (citing *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000); *La. Crawfish Producers Ass'n v. Rowan*, 463 F.3d 352 (5th Cir. 2006); *Airport Neighborhood Alliance, Inc. v. United States*, 90 F.3d 426 (10th Cir. 1996)).

99. *Id.* at 4.

100. B.C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 937 (2002).

101. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989)).

102. 42 U.S.C. § 4331.

103. COUNCIL ON ENVTL. QUALITY, *THE NATIONAL ENVIRONMENTAL POLICY ACT—A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS* 8, 17 (Jan. 1997), available at www.blm.gov/or/regulations/files/nepa25fn.pdf.

104. A recent market report indicates that Wal-Mart intends to increase its presence in inner city metropolitan areas and is altering both its design standards and its management and pricing approaches to achieve acceptable returns. *Weiner Dev., Weiner Report*, 1(6) *INDUSTRY BULL.* (Fall 2005).

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106. Brief, *supra* note 91, at 14.

107. Julia Cass & Peter Whoriskey, *New Orleans to Raze Public Housing; Many Units Closed Since Katrina to Be Demolished, Despite Protests*, *WASH. POST*, Dec. 8, 2006.

108. *Id.*

109. *Id.*

110. Adam Nossiter & Leslie Eaton, *New Orleans Council Votes for Demolition of Housing*, *N.Y. TIMES*, Dec. 21, 2007.

111. Rick Jervis, *Protestors Clash with Police in New Orleans; Vote to Demolish Public Housing Sparks Outrage*, *USA TODAY*, Dec. 21, 2007.

112. BILL QUIGLEY, *TWENTY-SEVEN LEGAL PROBLEMS WITH HANO-HUD DEMOLITION PLANS*, *ADVANCEMENT PROJECT* (June 2007), available at www.advancementproject.org/pdfs/katrina/Twenty-Seven%20Legal%20Problems%20with%20HANO-HUD%20Demolition%20Plans.pdf.

